

Message Text

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ORIGIN OPIC-06

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TO AMEMBASSY JAKARTA

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TAGS: EFIN

SUBJECT: GOI APPROVALS FOR OPIC INSURANCE: LICENSING

REF: (A) JAKARTA 5159; (B) STATE 176017

1. SUMMARY. OPIC RESPONSE TO GOI LEGAL PROBLEMS IN
ACCEPTING TECHNOLOGY LICENSING AS "INVESTMENT" FOR PURPOSES
OF OPIC COVERAGE REVIEWED WITH HOAGLAND. MOST-FAVORED-
NATION CONCERN IS MISPLACED AND LANGUAGE OF GOI AGREEMENTS
WITH OTHER COUNTRIES CAN ALSO BE CONSTRUED AS PERMITTING
COVERAGE OF MORE THAN DIRECT CAPITAL INVESTMENT.

2. OPIC OFFICIALS BRIEFED HOAGLAND JUNE 10 ON GOI PROBLEMS
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IN ACCEPTING LICENSING AGREEMENTS AS "INVESTMENT" FOR
PURPOSES OF OPIC COVERAGE AND REVIEWED POINTS WHICH OPIC
FEELS SHOULD BE MADE TO GOI. HOAGLAND WAS ADVISED THAT
EXTENT OF HIS INVOLVEMENT IN FOLLOW-UP ON THIS ISSUE WITH

CAPITAL INVESTMENT COORDINATING BOARD (BKPM) WOULD BE LEFT TO EMBASSY JUDGMENT, BUT THAT OPIC FELT IT ADVISABLE THAT HOAGLAND BE BRIEFED SO THAT HE CAN RESPOND EFFECTIVELY IF QUESTION IS RAISED WITH HIM BY INDONESIANS DURING CONSULTANCY.

3. PARA 5 REF (A) REPORTS VIEW OF BKPM LAWYERS THAT "MOST

FAVORED NATION" PROVISIONS OF BILATERAL INVESTMENT AGREEMENTS WITH OTHER COUNTRIES PRECLUDE CONSTRUING AGREEMENT WITH U.S. TO COVER INDIRECT INVESTMENTS SUCH AS LICENSING AGREEMENTS WHICH ARE NOT "CAPITAL INVESTMENT" UNDER THE FOREIGN CAPITAL INVESTMENT LAW AND HENCE NOT WITHIN THE SCOPE OF THESE OTHER BILATERALS. THIS VIEW DISTORTS MEANING AND PURPOSE OF THE MFN CLAUSES IN WHICH QUESTION DEAL WITH INVESTMENT INCENTIVES SUCH AS TAXATION AND FREE TRANSFERABILITY PROVIDED BY THE GOI WITHIN THE TERRITORY OF THE GOI. WHAT OPIC OR ANY OTHER FOREIGN AGENCY MAY PROVIDE BY WAY OF INCENTIVES TO APPROVED INVESTMENT IS A DISTINCTLY SEPARATE MATTER FROM THE INCENTIVES WHICH ARE PRESUMABLY SOUGHT TO BE PROTECTED BY THE SAID MFN CLAUSES. MERE GOI APPROVAL UNDER THE USG-GOI BILATERAL IS NOT AN EXERCISE OF GOI JURISDICTION OVER THE INVESTMENT OR INVESTOR SUCH AS IS EXERCISED IN THE GOI BILATERALS WITH OTHER COUNTRIES.

4. IT IS POSSIBLE THAT NOTION OF APPLICABILITY OF MFN MAY REVEAL A MORE BASIC MISCONCEPTION BY GOI OFFICIALS OF NATURE OF INDONESIAN COMMITMENTS UNDER INVESTMENT GUARANTY AGREEMENT WITH US. UNLIKE BROADER ECONOMIC COOPERATION AND INVESTMENT AGREEMENTS INDONESIA HAS ENTERED INTO WITH SEVERAL COUNTRIES, USG BILATERAL (AND CANADIAN) LIMITED TO PROCEDURAL ARRANGEMENTS RELATING TO OPERATION OF INSURANCE AND GUARANTY PROGRAMS AND CONTAIN NO UNDERTAKINGS AS TO TREATMENT OF INVESTOR AND INVESTMENT, APART FROM THE PROCEDURAL ARRANGEMENTS PROVIDED IN PARA 4 OF THE USG-GOI BILATERAL. INDONESIANS EXPRESSING MFN CONCERN MAY FEEL LIMITED OFFICIAL USE
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THAT BY TREATING LICENSING AGREEMENT AS "INVESTMENT" UNDER BILATERAL GOI IS ASSURING FREE TRANSFERABILITY PLUS NATIONAL AND MFN TREATMENT AS TO TAXATION, AS WOULD BE THE CASE IF THE LICENSING WERE DEEMED TO BE AN ENTERPRISE COVERED BY, E.G., THE ECONOMIC COOPERATION AGREEMENT WITH THE NETHERLANDS. THIS IS NOT THE CASE. NOTHING IN USG-GOI BILATERAL CONSTRAINS GOI RE ITS TREATMENT OF LICENSING ARRANGEMENT.

5. ARTICLE 1 OF THE FOREIGN CAPITAL INVESTMENT LAW OF 1967, AS AMENDED (INVESTMENT LAW) DEFINES "CAPITAL INVESTMENT" AS "DIRECT" INVESTMENT, AND THE OFFICIAL

ELUCIDATION OF THIS SECTION POINTS OUT THAT CREDIT IS NOT COVERED. THUS, LIMITING SCOPE OF INVESTMENT INSURANCE UNDER US AND OTHER AGREEMENTS STRICTLY TO SCOPE OF INVESTMENT LAW COVERAGE WOULD AFFECT NOT ONLY TECHNOLOGY LICENSING BUT ALSO IMPORTANT BACKING OF EXTERNAL PRIVATE LOANS TO PROJECTS. WHILE IT MAY BE PROPER TO DEFINE "CAPITAL INVESTMENT" NARROWLY FOR PURPOSES OF THE INCENTIVES, BENEFITS AND GUARANTIES CONFERRED BY THE INVESTMENT

LAW, NEITHER LOGIC NOR THE LANGUAGE OF THE VARIOUS BILATERAL COMPELS A SIMILAR LIMITATION OF THE TYPE OF INVESTMENT FOR WHICH OPIC COVERAGE MAY BE ISSUED. UNDER THOSE AGREEMENTS WHICH CONTAIN SUBSTANTIVE UNDERTAKINGS REGARDING THE TREATMENT OF INVESTMENT, THESE UNDERTAKINGS APPLY WHETHER OR NOT COVERAGE IS ISSUED, AND IT IS HARD TO SEE HOW IT COULD BE ARGUED THAT THE ISSUANCE OF COVERAGE BY THE HOME GOVERNMENT WOULD CONTROL THE STATUS UNDER INDONESIAN LAW. FROM THE STANDPOINT OF AGREEMENT LANGUAGE SOME AGREEMENTS USE A BROADER DEFINITION OF INVESTMENT THAN THE INVESTMENT LAW (E.G. BELGIUM: "DIRECT OR INDIRECT," "TECHNICAL PROCESSES"). EVEN WHERE THE INVESTMENT LAW IS CITED, THE LANGUAGE USUALLY CAN BE CONSTRUED AS NOT LIMITING THE SCOPE OF INVESTMENT GUARANTIES OR INSURANCE. (E.G. NORWAY: "THE PROTECTION ACCORDED TO INVESTORS BY THE PROVISIONS OF THIS AGREEMENT SHALL APPLY . . . (TO INVESTMENTS APPROVED UNDER INVESTMENT LAW)"). A CONTRACT OF GUARANTY IS NOT PROTECTION ACCORDED BY THE PROVISIONS OF THE BILATERAL. IN ALMOST ALL CASES THE WORDING OF THE SECTION ON INVESTMENT GUARANTIES MAY BE LIMITED OFFICIAL USE
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CONSTRUED AS PERMITTING EXTENSION OF THE CATEGORY OF "APPROVED INVESTMENT" BEYOND "CAPITAL" INVESTMENT UNDER THE INVESTMENT LAW. ONE CLEAR EXCEPTION APPEARS TO BE THE EXPLICIT REFERENCE IN THE CANADIAN AGREEMENT TO "CAPITAL INVESTMENT" IN PROJECTS UNDER THE INVESTMENT LAW.

6. POINT OF FOREGOING ANALYSIS IS TO PROVIDE TALKING POINTS TO PERSUADE GOI THAT NEITHER AMENDMENT OF LAW NOR (IN MOST CASES) REVISION OF BILATERALS WILL BE NECESSARY TO PERMIT INVESTMENT INSURANCE COVERAGE OF LOANS OR TECHNOLOGY TRANSFER BY THOSE PROGRAMS WHICH OFFER IT. NOT ONLY IS MFN INAPPLICABLE TO ISSUANCE OF FGA FOR OPIC COVERAGE OF LICENSING, BUT GOI NEED NOT FEAR THAT PRACTICAL CONSEQUENCE WOULD BE UNIQUELY BROAD US COVERAGE.

7. OPIC RECORDS SHOW THAT NO COVERAGE IN FORCE OR APPLICATION PENDING IN INDONESIA OTHER THAN CLUETTPEABODY AND ONE CONSTRUCTION CONTRACTOR APPLICATION INVOLVES COVERAGE OF NON-CAPITAL INVESTMENT UNRELATED TO DIRECT INVESTMENT COVERAGE. WE HOPE FURTHER DISCUSSION WITH

BKPM WILL CONFIRM POSITION THAT OPIC COVERAGE NEED NOT BE LIMITED TO PROJECTS APPROVED UNDER FOREIGN INVESTMENT LAW. REF (A) PARA 6 REPORTS BKPM DOES NOT WANT TO ESTABLISH PRINCIPLE OF GUARANTEED LICENSE FEE CONVERTIBILITY FOR DOMESTIC INVESTMENT. AS NOTED ABOVE,, APPROVAL FOR OPIC COVERAGE INVOLVES NO GOI UNDERTAKING RE TREATMENT OF SUBJECT INVESTMENT. IF OPIC PAID A CLAIM, IT WOULD BE SUBROGATED TO SAME RIGHTS INVESTOR WOULD HAVE WITHOUT COVERAGE. DOMESTIC INVESTMENTS ALSO NEED TO OBTAIN EXTERNAL CREDITS AND TECHNOLOGY IMPUTS AND WHERE ELIGIBLE FOR OPIC COVERAGE IT WOULD BE SELF-DEFEATING FOR GOI TO WITHHOLD APPROVAL. SUCH ARRANGEMENTS WOULD PRESUMABLY BE CONTROLLED BY CENTRAL BANK ACTION AND SUBJECT TO FOREIGN EXCHANGE RULES IN EFFECT FROM TIME TO TIME. WHILE FOREIGN EXCHANGE ASSURANCES MIGHT BE SOUGHT BY COMPANIES IN A GIVEN TRANSACTION, THE FACT OF GOI APPROVAL FOR OPIC COVERAGE WOULD NOT CONSTITUTE A GUARANTY OF CONVERTIBILITY.

8. WE ARE ENCOURAGED BY INDICATIONS IN REF (A) THAT GOI REALLY WANTS TO FIND SOLUTION. OUR RESPONSE
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TO LEGAL PROBLEMS PERCEIVED BY BKPM HAS BEEN SET FORTH AT SOME LENGTH TO ENABLE EMBASSY TO PURSUE MATTER WITH BKPM, HOPEFULLY TO POINT OF SUCCESSFUL RESOLUTION. BELIEVE HOAGLAND CAN BE HELPFUL. ADVISE IF FURTHER INFORMATION OR ASSISTANCE IS REQUIRED.

9. FURTHER TO PARAGRAPH 7 ABOVE, OPIC HAS ISSUED INSURANCE COVERAGE TO CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO FOR A LOAN TO JAKARTA HILTON HOTEL (P. T. INDOBUILDCO), A WHOLLY INDONESIA-OWNED ENTERPRISE, ON THE STRENGTH OF AN FGA ISSUED BY THE BOARD OF INVESTMENT ON APRIL 27, 1972. THE FGA LETTER INDICATES THAT CONTINENTAL HAD APPLIED TO THE GOI FOR APPROVAL UNDER DOMESTIC INVESTMENT LAW NO. 6/1968. JAKARTA A-84 OF MAY 2, 1973 WHICH FORWARDED THE FGA NOTED THAT THE APPROVAL OF A U.S. BANK LOAN TO AN

INDONESIAN INVESTOR SET A PRECEDENT. DECONTROL 6/18/76
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